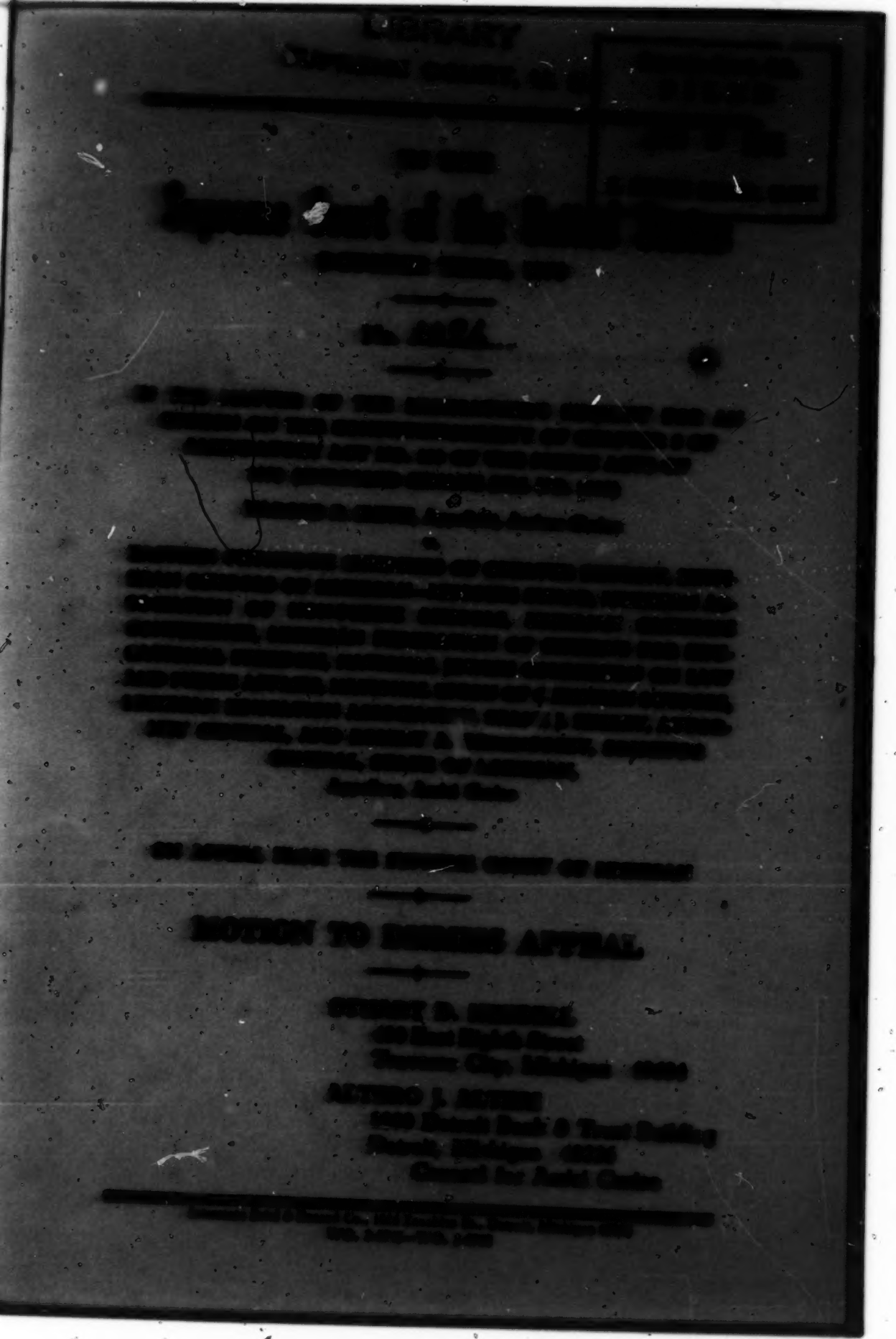

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

No. .....

IN THE MATTER OF THE LEGISLATURE'S REQUEST FOR AN OPINION ON THE CONSTITUTIONALITY OF CHAPTER 2 OF AMENDATORY ACT NO. 100 OF THE PUBLIC ACTS OF 1970 (ENROLLED SENATE BILL NO. 1082)

HAROLD R. SMITH, Appellant, Amicus Curiae

v.

EASTERN ORTHODOX CHURCHES OF GREATER DETROIT, LUTHERAN SCHOOLS OF MICHIGAN—MISSOURI SYNOD, MICHIGAN ASSOCIATION OF NON-PUBLIC SCHOOLS, MICHIGAN CATHOLIC CONFERENCE, MICHIGAN FEDERATION OF CITIZENS FOR EDUCATIONAL FREEDOM, NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS, NATIONAL UNION OF CHRISTIAN SCHOOLS, MICHIGAN EDUCATION ASSOCIATION, FRANK J. KELLEY, ATTORNEY GENERAL, AND ROBERT A. DERENGOSKY, SOLICITOR GENERAL, STATE OF MICHIGAN,

Appellees, Amici Curiae

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

## MOTION TO DISMISS APPEAL

Appellees, Eastern Orthodox Churches of Greater Detroit, Lutheran Schools of Michigan—Missouri Synod, Michigan Association of Non-Public Schools, Michigan Catholic Conference, Michigan Federation of Citizens for Educational Freedom, National Jewish Commission on

Law and Public Affairs and National Union of Christian Schools, by their counsel, move the Court to dismiss the appeal herein on the following grounds:

I.

APPELLANT, HAROLD R. SMITH, FAILS TO SHOW THAT THE PRESENT PROCEEDING INVOLVES A CASE OR CONTROVERSY UNDER THE UNITED STATES CONSTITUTION, AND, THEREFORE, FAILS TO SHOW THAT THE COURT HAS JURISDICTION.

In Sections 66 and 66a of Act 100 of the Public Acts of 1970, Appellant's Jurisdictional Statement, Appendix B, page 33a, the Michigan Legislature requested from the Michigan Supreme Court a determination of the constitutionality of Chapter 2 of that act. This request for an advisory opinion was made pursuant to Mich. Const. Art. III, Sec. 8 which provides:

> Either house of the legislature or the governor may request the opinion of the Supreme Court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date.

It was pursuant to this Section of the Constitution that the above-captioned matter reached and was decided by the Michigan Supreme Court on September 14, 1970. See Appellant's Jurisdictional Statement, Appendix D, page 37a.

Notwithstanding the authority granted to the Michigan Supreme Court by the Michigan Constitution, it is quite clear that the Supreme Court of the United States has subject matter jurisdiction which extends only to "cases or controversies." U. S. Const. Art III, Section 1. It is equally obvious that the request for an advisory opinion, even relating to the constitutionality of a state statute,

will not be entertained by any federal constitutional court. *Local No. 8-6, Oil, Chemical and Atomic Workers Int'l Union v. Missouri*, 361 U.S. 363, 367-68 (1960); *Liverpool, N. Y. & P. S. S. Co. v. Commissioners*, 113 U.S. 33, 39 (1885). Since this proceeding originatgd in a request by the Michigan legislature for an advisory opinion, it does not constitute the requisite "case or controversy" under the Federal Constitution.

Nor does it confer jurisdiction on this Court to assert that Harold R. Smith seeks a declaratory judgment from this Court relating to the validity of Act 100. The Declaratory Judgment Act, 28 U.S.C. Section 2201, relied on in Appellant's Jurisdictional Statement, requires a showing of an actual controversy within the Court's jurisdiction as a basis for justiciability. Absent such a showing, neither the Constitution nor the Declaratory Judgment Act has been satisfied, and the Court lacks jurisdiction. *Golden v. Zwickler*, 394 U.S. 103, 110 (1969).

## II.

### APPELLANT FAILS TO SHOW ANY FACTS IN HIS JURISDICTIONAL STATEMENT INDICATING THAT HE HAS STANDING TO TAKE AN APPEAL FORM THE DECISION OF THE MICHIGAN SUPREME COURT.

Harold R. Smith, pursuant to leave of the Michigan Supreme Court, appeared and filed a Brief in this proceeding, not as a party, but as an *amicus curiae*. His status before the Michigan Supreme Court, therefore, was not that of an adversary or combatant, but rather that of a friend of the court. As such, under Michigan law, he was not a party to the proceeding and had no rights or liabilities therein except such as related to the filing of a Brief. He could not introduce testimony, he could not be heard orally

and he was not bound by any judgment of that Court. See *Grand Rapids v. Consumers Power Co.*, 216 Mich. 409, 415 (1921). Not being a party to the proceedings below, Harold R. Smith cannot show that the enforcement of the challenged order of the Michigan Supreme Court deprives him of a right arising under the constitution or laws of the United States. See *Liberty Warehouse Co. v. Tobacco Growers*, 276 U.S. 71, 88 (1928). Mr. Smith, therefore, lacks the standing appropriate and necessary to file this appeal.

Wherefore, the above named appellees pray that this Court enter an order dismissing the appeal.

Respectfully submitted,

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